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SUPREME COURT, U. S.

DEC 3 1970

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IN THE

Supreme Court of the United States

No. 169

STEPHEN RADICH,

Appellant,

VS.

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

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Opinions Below

The opinion of the Court of Appeals of the State of New York (A 6a-17a),* and the dissenting opinion of Chief Judge Fuld (A 18a-22a), are reported at 26 N.Y. 2d 114 (1970), 308 NYS 2d 846 (1970). The opinion of the Criminal Court of the City of New York, New York County (A 25a-30a) and the dissenting opinion of Judge Amos Basel (A 31a-36a) are reported at 53 Misc.2d 717, 279 NYS2d 680. The Appellate Term, First Judicial Department of the Supreme Court of the State of New York affirmed without opinion, which affirmance is reported at 57 Misc.2d 1082, 294 NYS2d 285.

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* All page references are to Appellant's Appendix.

Jurisdiction

The order of the Court of Appeals was entered on February 18, 1970. The Jurisdictional Statement was filed May 18, 1970 and probable jurisdiction was noted on October 19, 1970. This court has jurisdiction under 28 U.S.C. § 1257(2).

Statute Involved

Section 1425, Penal Law of New York, subdivision 16 (now General Business Law, Section 136):

16. Any person who

a. In any manner for exhibition or display, shall place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement, of any nature upon any flag, standard, color, shield or ensign of the United States of America, or the state of New York, or shall expose or cause to be exposed to public view any such flag, standard, color, shield or ensign, upon which after the first day of September, nineteen hundred and five, shall have been printed, painted or otherwise placed, or to which shall be attached, appended, affixed or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature, or

* * * * *

d. Shall publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act, or

* * * * *

f. Shall publicly carry or display any emblem, placard or flag which casts contempt, either by word or act, upon the flag of the United States of America

* * * * *

Shall be guilty of a misdemeanor.

The words flag, standard, color, shield or ensign, as used in this section, shall include any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation, of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation, may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America or of the state of New York.

This subdivision shall not apply to any act expressly permitted by the Statutes of the United States of America, or by the United States army and navy regulations, nor shall it be construed to apply to a certificate, diploma, warrant, or commission of appointment to office, ornamental picture, article of jewelry, stationery for use in private correspondence, or newspaper or periodical, on any of which shall be printed, painted or placed, said flag, standard, color, shield or ensign disconnected and apart from any advertisement.

* * * * *

Questions Presented

1. Does the First Amendment to the United States Constitution permit the suppression of sculpture on the ground that it has been found to be contemptuous of our national symbol?

2. Does the statute under which appellant was convicted further any governmental interest other than compelling veneration for the flag, and is the interest which is furthered by the statute unrelated to the suppression of free speech?

3. Is the prohibition against casting contempt upon the flag in the statute under which appellant was convicted sufficiently clear, certain and limited to meet the requirements of the First and Fourteenth Amendments?

4. Does the equal protection clause of the Fourteenth Amendment bar the conviction of appellant for displaying sculpture in an art gallery under a statute which permits magazine and newspaper publishers to show photographs of that sculpture in their publications and permits exhibition of paintings on the same theme?

Statement of the Case

The Trial Court found that appellant cast contempt on the American flag by exhibiting in his art gallery certain sculptures utilizing American flags or what appeared to be American flags (A 27a; 30a). He therefore was convicted of violating subdivision 16d. of Section 1425 of the Penal Law of New York (currently Section 136(d) of the General Business Law) which makes it a misdemeanor to cast contempt upon the flag of the United States of America, or any picture or representation of the flag. He was sentenced to pay a fine of $500 or in lieu thereof to serve 60 days in the Workhouse (A 122a).

The sculptures, called constructions, had been created by an artist named Marc Morrel, and were exhibited in appellant's Madison Avenue art gallery, which had customarily exhibited one-man shows of sculpture (A 76a-78a; 104a).

Shortly after the Morrel exhibition opened, appellant was served with a summons in his gallery by a police officer (A 40a). At the trial, the complaining police officer testified that, from Madison Avenue, he had observed one of the sculptures—what appeared to him to be the flag in the shape of a human body hanging from a yellow noose—in the window of appellant's second floor gallery (A 40a); that he had seen that sculpture and others when he entered the gallery with a police photographer who photographed the works (A 40a) (the photographs were introduced into evidence as People's Exhibits 1-9); that appellant and one other person were present (A 45a); and that anti-war music was being played (A 80a). There was no testimony of disturbance or disorder or circumstances which might lead to disorder.[1]

Two witnesses, appellant (A 76a) and the Art News Editor of the New York Times, Mr. Hilton Kramer (A 98a) testified for the defense. As experts in the art field (A 77a; 98a-99a), they stated their opinion that the sculptures or constructions were art (A 80a-81a; 104a)—a form of protest art in the tradition followed by Goya, Michelangelo and Picasso (A 81a). Appellant also testified that he did not intend to express contempt for the flag by exhibiting the sculpture (A 82a). Both witnesses testified that contemporary artists use many unconventional materials and frequently mix materials, so that there is today no distinct line between sculpture and painting (A 77a; 101a).

Appellant was tried by a three-judge court which found (Basel, J., dissenting) that appellant had "cast contempt"

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[1] The sculpture observed by the police officer, consisting of the flag hanging from a noose, was the only Morrel sculpture visible from the street (A 40a). In order to view the remaining Morrel works, the arresting officer entered the building, climbed to the second floor and entered appellant's gallery (A 45a).

upon the flag by exhibiting the sculpture (A 27a; 30a). The conviction was affirmed by the Appellate Term, New York County, of the Supreme Court of the State of New York and by the Court of Appeals of the State of New York. The execution of appellant's sentence of a $500 fine or 60 days in jail has been stayed pending appeal.

Summary of Argument

The New York Court of Appeals has construed the statute at issue herein to outlaw all sculpture utilizing the American flag which a reasonable man would believe "dishonored" the flag, regardless of whether the artist or exhibitor actually intended to cast contempt upon the flag and regardless of whether any danger of a breach of the peace actually existed as a result of the exhibition.

Under our system of government, it cannot be a crime for a citizen to cast contempt upon any symbol of government. Since casting contempt inevitably involves the communication of an idea, it cannot be made criminal.

The expression of political or purely aesthetic themes by means of art forms is a traditional method of communication meriting plenary constitutional protection. There is no justification for distinguishing between verbal communication and sculpture in terms of the constitutional protection afforded to each.

The statute in question permits the use of the flag for the dissemination of orthodox political views, but renders criminal its use to criticize current governmental policy. Statutes which permit Americans to praise their government, but prohibit them from criticizing it are unconstitutional.

The statute in question, as construed by the Court below, furthers no governmental interest other than veneration

for the flag. Respect for the flag cannot be compelled in a free society.

The statute in question violates the void-for-vagueness and overbreadth doctrines enunciated by this Court because a) it is so vague and imprecise as to fail to apprise the public of the scope of its proscription; b) it fails to provide local officials with adequate standards for enforcement; c) constitutionally protected conduct may be swept within its ambit and d) it has been construed to create a "strict liability" offense in the area of the First Amendment.

Finally, the statute erects wholly irrational distinctions among photographs, ornamental pictures and sculpture.

I.

Appellant's Conviction Violates the First Amendment Guaranty of Freedom of Speech.

A. "Casting Contempt" Means to Communicate an Idea or Attitude; a Statute That Bans Such Communication Is Unconstitutional.

Appellant was convicted under a clause of the statute which makes it a crime publicly to cast contempt upon the flag. Although the same subdivision of the statute, (d), also prohibits mutilation, defacement, defilement and trampling upon the flag and another subdivision, (a), bars the placing of words, marks, pictures or emblems upon the flag, appellant's conviction does not involve any of these.

Appellant was convicted expressly for casting contempt on the flag. *People* v. *Radich,* 53 Misc. 2d 717, 279 NYS 2d 680 (New York Criminal Court, 1967) (A 27a). In other

words he was convicted for exhibiting scorn or disdain[2] for the flag; for communicating an idea or an attitude.

By lumping "casting contempt" with mutilation and defacement, the statute obfuscates the purely communicative meaning of casting contempt. If one of the synonyms for contempt—disdain or scorn—were substituted for it in the statute, the unconstitutionality of the prohibition would be more immediately obvious.[3] Perhaps because of the legal concept of contempt of court and legislative bodies, use of the word "contempt" in the flag statute obscures the fact that what the flag statute purports to ban is the simple communication of an idea. Contempt of court or of a legislative body involves an entirely different concept.[4]

It must be conceded that the purpose of the New York statute is to prevent the flag from being profaned, i.e., to require it to be treated as a sacred object. Indeed, the New York Court of Appeals referred to it as *"the flag desecration statute"* (A 9a); 26 N.Y. 2d at 123. (Emphasis added) In seeking to justify it, the Court stated that there was a discernible legislative purpose to prevent a breach of the peace "regardless of the major motivating factor

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[2] "Syn. (noun) 1. Scorn, disdain, and contempt denote feelings directed toward that which we regard as base or repellent. Scorn is the mildest term; it may be shown simply by avoidance of the unworthy. Disdain suggests a more overt expression, as shown by the proud or haughty rejection of that which offends. We may show scorn or disdain toward something we find repellent or uninteresting; contempt always implies the passing of an adverse moral judgment upon another person or thing. Ant. regard, approval, appreciation." (Funk and Wagnall's Standard College Dictionary (1963)).

[3] The only other prohibition against the attitude of contempt known to appellant is in the Uniform Code of Military Justice. Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 Harv. L. Rev. 1697 (1968).

[4] Goldfarb, The Contempt Power, 1963 p. 1.

behind its enactment." (A 9a; 26 N.Y. 2d at 124). The Court thus implicitly conceded that the major motivation for the statute was to prevent the flag from being profaned.

The true motivation can also be seen from the fact that New York has a disorderly conduct statute (N.Y. Penal Law § 240.20, at the time of this prosecution § 722), which serves the purpose of preventing breaches of the peace, and which encompasses conduct which causes public disturbances. "Any sensible construction of the first amendment would forbid a legislature to go out of its way to inhibit expression, either by design or accident, and the choice of the harsher of equally effective means suggests that suppression of speech was the legislature's real purpose from the start." Note, *Less Drastic Means and the First Amendment*. 78 Yale L.J. 464 (1969) at 469.

This Court has previously decided, in *Street* v. *New York*, 394 U.S. 576 (1969), that a state may not "constitutionally inflict criminal punishment upon one who ventures 'publicly [to] defy . . . or cast contempt upon [the American flag] by words . . .'." (Ibid, p. 590). Appellant believes that the communication of contempt for which he has been convicted is entitled to the same constitutional protection which this Court granted to Street's words. Cf. *Hodsdon* v. *Buckson*, 310 F.Supp. 528 (D.Del. 1970); *Tinker* v. *Des Moines*, 393 U.S. 503 (1969); *Stromberg* v. *California*, 283 U.S. 359 (1931).

B. The First Amendment Prohibits Punishment for Exhibition of Sculpture on the Ground That It Has Been Found to Be Contemptuous of the Flag.

It is important to note that we are dealing here with pure speech, not so-called symbolic speech. Painting and sculpture are "speech", as that term is used in the First Amendment, as much as words—indeed, the earliest form of writing was picture writing.

A work of art, whether it be a poem, a novel, a play, a painting, a cartoon drawing or a piece of sculpture is a form of expression protected by the First Amendment. *Roth* v. *United States,* 354 U.S. 476, 487 (1957). *Joseph Burstyn, Inc.,* v. *Wilson,* 343 U.S. 495, 501-502 (1952). Two and three dimensional art forms have, throughout history, expressed political ideas. Artists have traditionally raised their "voices" in social protest:

> "They have used the most effective weapon at their command—their art—to needle the Establishment, duel with oppressive governments, satirize corrupt or indifferent churches, strip bare the foul futility of war, attack exploitation, uncover the bleak existence of the poor, and in general to make visual comment on human folly in its infinite variations." Shikes, *The Indignant Eye: The Artist as Social Critic* (Boston, 1969, Introduction, p. xxiii).

Political ideas are given priority under our constitutional scheme. *N. Y. Times* v. *Sullivan,* 376 U.S. 254, (1964). The sculpture exhibited by appellant was protest art. Such art has expressed its creators' opposition to the institutions of every society even when banned by totalitarian regimes. Michelangelo protested against the church; Goya criticized the corruption of the Spanish monarchy; Daumier (misspelled Eudonia in the transcript) criticized judges, lawyers and the system of justice; Pablo Picasso in *Guernica* condemned the atrocities of the Spanish Civil War (A 81a).

The dissenting opinion in the Court of Appeals described the message communicated by the artistic work at issue here:

> "[T]he artist in the present case unquestionably made use of the flag for the purpose of expressing his political philosophy or views, his dissatisfaction with, and

> opposition to, the Vietnam War and other activities carried on by the Government. The challenged 'constructions' were, in effect, but three-dimensional political cartoons. . . .
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> • • • • •
>
> "It is evident that the only reason why these works of Morrel were singled out for prosecution was not because the flag was used in the sculptures but solely because of the particular political message which those sculptures were intended to convey. In a very real sense, therefore, it was not the artist's *act* of making use of the flag which is being punished but solely the *protest* or the political views he was seeking to express thereby" (Dissenting Opinion of Fuld, Ch. J., 26 N. Y. 2d at 128) (A 21a). (Emphasis in Original.)

The statutory language used—casting contempt—precludes punishment for praising United States policy; the use of a flag motif to praise the Vietnam war will not violate that provision of the statute. The existence of the "casting contempt" language has, apparently, affected the application of the entire statute. The prohibitions in the statute against mutilating or marking the flag have been invoked against those using a peace symbol on the flag in opposition to the Vietnam war and, to counsel's knowledge, not against those marking the flag with words or symbols of support for the war or for political candidates supporting the war. Cf. *Long Island Vietnam Moratorium Committee* v. *William Cahn*, —— F. Supp. —— (E.D.N.Y. 1970), currently pending before United States Court of Appeals for the Second Circuit, No. 35287, argued November 12, 1970.

This Court has held that a statutory provision which leaves Americans free to praise the war in Vietnam, but can send them to prison for opposing it cannot constitu-

tionally be sustained. *Schacht* v. *United States,* 398 U.S. 58 (1970).

In *Schacht,* this Court considered a statute which authorized wearing the uniform of one of the armed forces in theatrical productions only "if the portrayal does not tend to discredit that armed force". Since wearing a military uniform without authorization is a crime, actors could perform in plays in uniform only if the performance did not criticize the conduct or policies of the military. In order to say whatever they wished, actors had to forego the uniform.

Schacht was convicted for wearing an army uniform in a skit which was part of an antiwar demonstration.[5] He contended that the statutory prohibition against the wearing of a military uniform in a play critical of the armed forces imposed an unconstitutional restraint on his right of free speech. Stating that a clause "which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment," this Court reversed the conviction and ordered the restrictive language struck from the statute.

The statutory clause struck by this Court in *Schacht* is similar to that at issue on this appeal. If Radich chose to exhibit sculpture employing flag themes, the sculpture could not appear to discredit the flag. He could, of course, choose to show only sculpture which did not refer to the flag, just as Schacht could have chosen to wear a a sign reading "U.S. soldier" instead of wearing a military uniform.

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[5] The art form employed by Schacht like that in the present case did not necessarily express its message by means of language. Although the skit for which Schacht was prosecuted involved some words, it is unlikely that the decision would have been different if it had been pantomime.

The First Amendment embraces the sculptures exhibited by appellant as well as the skit in which Schacht appeared. Insults to the military uniform may arouse as much resentment in some persons as insults to the flag, but no exception from the Constitutional mandate may be made for either.

In *Hodsdon* v. *Buckson*, 310 F. Supp. 528 (D. Del. 1970), a three judge United States District Court repudiated the concept that non-verbal communicative activity involving the flag was not entitled to the plenary protection of the First Amendment. Judge Seitz, writing for the Court, stated:

> "The crucial issue, therefore, is whether, although the state may not . . . punish words defiant or contemptuous of the flag, it may nevertheless punish acts which convey identical ideas.
>
> "Expression is not confined to the spoken and written word. A court may take judicial notice of the symbolic significance of particular acts. . . . Thus, although acts are not beyond regulation because they have symbolic components, in the absence of factors justifying limitation, symbolic speech is constitutionally protected." (310 F. Supp. at 533) (Footnotes omitted)

See also *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Stromberg* v. *California*, 283 U.S. 359 (1931).

The Delaware District Court, rejecting the notion that the state interest in preventing breaches of the peace justifies Delaware's flag statute (which is identical in all material respects to the New York statute at issue herein), declared the statute unconstitutionally overbroad.[6]

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[6] Appellant does not believe that the creation or exhibition of sculpture is "symbolic speech"; rather it is "pure speech," entitled

II.

The Only Governmental Interest Furthered by the Flag Desecration Statute Is Respect for the Flag, Which Cannot Be Furthered Without Violating the First Amendment.

Appellant was convicted because he "cast contempt" on the flag. The statute does not forbid the exhibition of sculpture; it forbids the message communicated by that sculpture. New York's statute, as applied by the court below, protects no state interest other than compelling veneration for the flag. Respect for the flag cannot be compelled in a free society. *West Virginia* v. *Barnette,* 319 U.S. 624 (1943); *Street* v. *New York,* 394 U.S. 576 (1969).

This case is yet another in a series of judicial explorations into the constitutional implications of state imposed flag veneration. *West Virginia* v. *Barnette,* 319 U.S. 624 (1943); *Street* v. *New York,* 394 U.S. 576 (1969); *Hodsdon* v. *Buckson,* 310 F. Supp. 528 (D. Del. 1970); *Frain* v. *Baron,* 307 F. Supp. 27 (EDNY 1970); *Halter* v. *Nebraska,* 205 U.S. 34 (1907). See generally, *Render Unto Caesar: The Flag Salute Controversy* (University of Chicago Press 1962); Note, *Freedom of Speech-Desecration of National Symbols as Protected Political Expression,* 66 Mich. L. Rev. 1040 (1968); Note, *Symbolic Conduct,* 68 Col. L. Rev. 1091 (1968); Note, *Freedom of Speech and Symbolic Conduct: The Crime of Flag Desecration,* 12 Ariz. L. Rev. 71 (1970).

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to maximum constitutional protection. Appellant believes this appeal to be governed by *Street* v. *New York, supra.* Even if, however, appellant's exhibition is viewed as symbolic conduct, the rationale of *Tinker* v. *Des Moines,* 393 U.S. 503 (1969); *Stromberg* v. *California,* 283 U.S. 359 (1931); and *Hodsdon* v. *Buckson,* 310 F. Supp. 528 (D. Del. 1970) would compel a reversal.

In each case, the underlying dilemma has been the extent to which a free society may compel respect or veneration for its flag. Appellant believes that in a free society no person should be compelled to make ritualistic obeisance to a trapping of the state, whether by being ordered to salute it, or by being coerced into observing a series of taboos concerning its use. The effect of either form of compulsion is to create a secular equivalent of a religious icon.

Paradoxically, our flag, as the emblem of a society of free men, must symbolize the right of free men to scorn it if their consciences so dictate.

In *Street* v. *New York*, *supra*, this Court identified four governmental interests which might have been furthered by punishing Street for his words and found that none of them justified his conviction.

Since the sculpture exhibited by appellant is a form of expression protected by the First Amendment, we examine those four governmental interests to see if they justify appellant's conviction here. They are: "(1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate against him, thereby causing a breach of the peace; (3) an interest in protecting the sensibilities of passers-by who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words upon others, showed proper respect for our national emblem." *Street* v. *State of New York*, 394 U.S. 576, at 591 (1969).

None of these interests constitutionally justify appellant's conviction for the same reasons that this Court ruled they could not justify Street's conviction.

First, appellant's exhibition did not incite an unlawful act and Section 1425, 16(d) (currently Section 136(d), General Business Law) does not purport to punish only such contemptuous expression as amounts to incitement.

Second, a conviction cannot be justified because of the possible tendency of appellant's expression to provoke violent retaliation; the exhibition in a second floor gallery devoted to art works is not so inherently inflammatory as to constitute "fighting words", and the statute is not narrowly drawn to punish only words which are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 574 (1942).

The New York Court of Appeals has construed the statute as creating a heckler's veto even where there are no hecklers. The court below has in effect ruled that casting contempt on the flag in public creates an irrebuttable presumption that a breach of the peace will follow. Appellant submits that such a presumption is inconsistent with the Constitution.

The legislative determination in advance that all "contemptuous" flag usage is illegal, without regard to the actual imminence of public disorder, constitutes governmental regulation of speech so broad that it violates *Chaplinsky.*

Even where the danger of a breach of the peace is demonstrated, speech may not be prohibited if other methods are available to prevent a breach of the peace. Compare, *Terminiello* v. *Chicago,* 337 U.S. 1 (1949) with *Feiner* v. *New York,* 340 U.S. 315 (1951). The mere fact that a given expression of opinion may displease onlookers and even rouse them to anger does not justify a blanket prohibition upon such expression. The First Amendment does not

permit such a heckler's veto. *Tinker* v. *Des Moines,* 393 U.S. 503 (1969).

Appellant's conviction cannot be sustained on the third ground. "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street* v. *State of New York,* 394 U.S. at 592.

With respect to the fourth ground, the Supreme Court stated:

> "Finally, such a conviction could not be supported on the theory that by making the above-quoted remarks about the flag appellant failed to show the respect for our national symbol which may properly be demanded of every citizen. In *West Virginia State Board of Educ.* v. *Barnette,* 319 U.S. 624 (1943), this Court held that to require unwilling schoolchildren to salute the flag would violate rights of free expression assured by the Fourteenth Amendment. In his opinion for the Court, Mr. Justice Jackson wrote words which are especially apposite here:
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> > 'The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate social organization. . . . (F)reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
> >
> > 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can

prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.' Id., at 641-642. (Footnote omitted.)

"We have no doubt that the constitutionally guaranteed 'freedom to be intellectually . . . diverse and even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous." *Street* v. *State of New York*, 394 U.S. at p. 593.

The Court below attempted to distinguish this case from *Barnette* and from *Stromberg* v. *California*, 283 U.S. 359 (1931):

"However, the statutes prohibiting certain kinds of exhibition of foreign flags, and statutes requiring the salute to our flag (Cf. *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624) are clearly designed for no other purpose than communicative suppression whereas a flag desecration statute is aimed at keeping the peace." 26 N.Y. 2d at 124.

There is nothing in the design of the statute to support the distinction; the statute in *Stromberg* could have been justified on the same ground. New York's flag desecration statute is not phrased, and has not been construed, to require a finding of public disturbance, or an imminent breach of the peace.[7]

[7] The statute under which appellant was convicted was entitled "Malicious Injury to and Destruction of Property"; its 15 other

If preserving the public peace was the primary objective in prosecuting appellant, he could have been charged under New York's disorderly conduct statute. However, a conviction under that statute could not have been sustained. The testimony indicated no disorder (A 44a-45a). The exhibition in question occurred in the quiet surroundings of a second floor art gallery in midtown Manhattan. It is difficult to conceive of a forum within which the expression of ideas would be less likely to lead to a breach of the peace. As Chief Judge Fuld stated:

> ". . . I do not understand how it may reasonably be said that the mere display of Morrel's constructions in an art gallery, distasteful though they may be, poses the type of threat to public order necessary to render such an act criminal. This prosecution, in my view, is nothing more than political censorship falling far outside our holding in *People* v. *Street,* and may not be constitutionally sustained." (A 22a); 26 N.Y.2d at 129.

To deny, as has the Court below, plenary constitutional protection to protest art because its subject is the flag, is to narrow the protection of the First Amendment to those ideas approved by the majority. Nevertheless, the Court of Appeals of the State of New York has affirmed appellant's conviction for publicly expressing opinions by means of flag sculpture on the ground that the art work invited its audience "to join in the protest, or in counter-protest, with the consequent potential of public disorder." (A 10a); 26 N.Y.2d 119.

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subdivisions included such conduct as cutting down other people's timber, skating on a commercial ice pond and taking another's oysters; it is now codified under Article 9B of the General Business Law entitled "Uses of Names and Symbols" as Section 136 "Exhibition or Display of the Flag." The codifiers have apparently not recognized it to be a disorderly conduct statute.

A potentially hostile audience cannot serve to change the expression of ideas to criminal conduct. *Tinker* v. *Des Moines,* 393 U.S. 503 (1969); *Terminiello* v. *Chicago,* 337 U.S. 1 (1949); *Edwards* v. *South Carolina,* 372 U.S. 229 (1963); *Cox* v. *Louisiana,* 379 U.S. 536 (1965); *Bachellar* v. *Maryland,* 397 U.S. 564 (1970). Further, there was no evidence of any potentially hostile audience.

As this Court stated in *Tinker* v. *Des Moines Independent School Dist., supra,* in holding unconstitutional a ban against black armbands worn as an expression of opposition to the Vietnam War:

> ". . . in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken . . . that deviates from the view of another may start an argument or cause a disturbance. But our Constitution says we must take this risk. *Terminiello* v. *Chicago,* 337 U.S. 1 (1949)." 393 U.S. at 508.

The rationalization of the Court of Appeals finds no support in *United States* v. *O'Brien,* 391 U.S. 367 (1968). The governmental interest furthered by the statute prohibiting draft card burning was held to be preservation of draft cards to facilitate administration of the draft. The same kind of analysis of the flag desecration statute would show that the governmental interest furthered by the flag desecration statute is respect for the flag, not insuring public peace.

Finally, it should be noted that the dissenting opinions in *Street* lend no support for sustaining appellant's conviction. Chief Justice Warren, Mr. Justice Black and Mr.

Justice White rejected the majority's finding that Street's words might have been the basis for his conviction. They concluded that Street was convicted for burning an American flag, a mutilation prohibited by the statute. Street claimed constitutional protection because his act was a means of expressing his dissatisfaction with the social conditions within our country, not because it was in itself a constitutionally protected form of expression, as is the sculpture which was the basis of appellant's conviction.

III.

New York's Flag Desecration Statute Is Unconstitutional on Its Face Because It Is Unclear, Uncertain and Overbroad in Violation of the Fourteenth Amendment.

Appellant has been found guilty under a statute which makes it a crime to "cast contempt" upon the flag. This standard for criminality is entirely inadequate to meet the constitutional requirements which have been established by this Court.

As Judge Basel noted, dissenting at trial, conduct which one person deems respectful, another can find defiant or contemptuous. In view of the fact that the 100,000 people who paraded to the U. N. headquarters in New York on April 15, 1967 were critical of the uses to which the flag was being put in Vietnam, he suggested that if they were Radich's judges, it is doubtful they would have found his exhibition of these sculptures contemptuous; while if those who hurled insults at the parade were his judges, they would almost certainly have found him guilty. (A 32a); 279 NYS 2d at 688-689.

In *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495 (1952), a ban on "sacrilegious" motion pictures was approved by

the New York Court of Appeals. In reversing, this Court said:

> "New York's highest court says there is 'nothing mysterious' about the statutory provision applied in this case: 'It is simply this: that no religion, as that word is understood by the ordinary, reasonable person, shall be treated with contempt, mockery, scorn and ridicule. . . .' This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition of 'sacrilegious' given by the New York courts, the censor is set adrift upon a boundless sea and a myriad of conflicting currents of religious views . . ." 343 U.S. at 504-505.

The criterion established by the statute in *Burstyn* was whether a religious theme was treated in such a manner as to offend the religious beliefs of any group of persons. The criterion established by the flag desecration statute—whether a political symbol is treated in such a manner as to offend the political beliefs of any group or person—is equally vague and offensive under our Constitution.

The very definition of what constitutes a flag leaves the determination of whether or not a crime has been committed to the subjective reaction of any non-deliberative onlooker. The statute defines a flag as anything "of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, *or by which the person seeing the same, without*

deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America, or of the state of New York." (Emphasis added.)

In *Long Island Vietnam Moratorium Committee* v. *Cahn, supra,* a three judge court was unable to agree on the threshold issue of whether the symbol prosecuted in that case constituted a flag under the New York statute. If three judges could not agree on what constitutes a flag under the statute, how can the average citizen understand the scope of the statute?

Governmental regulations which fail to apprise the public of the scope of their proscriptions violate the Fourteenth Amendment, e.g., *Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939). The uncertainty inherent in the statute under which appellant was convicted is particularly disturbing because it affects communication. The decision of the trial court below illustrates the danger in permitting such imprecise statutes. The majority opinion states:

> "If he [the defendant] wishes to approach the brink of what is proscribed he necessarily gambles on an adverse finding by the court." (A 30a); 279 N.Y.S. 2d at 685.

However, it is entirely contrary to the holdings of this Court to require a person to "gamble" on whether a particular form of expression is or is not permitted. To require such a "gamble" inevitably inhibits free expression. E.g., *Smith* v. *California,* 361 U.S. 147 (1959) at 151; *NAACP* v. *Button,* 371 U.S. 415 (1963), at 432-433.

As applied in this case, the chilling effect upon the free dissemination of ideas of the vague statutory language is enhanced by the fact that the statute has been construed to require no finding of appellant's intent to cast contempt upon the flag.

Appellant testified that he did not intend to cast contempt upon the flag by exhibiting the sculpture (A 82a) and that in fact he thought the artist might be expressing, not contempt for the flag, but contempt for those who were using the flag for aggressive purposes. The trial court held no intent to violate the statute was required for conviction (A 30a). The Court of Appeals specifically affirmed that holding: ". . . but even if we assume that defendant had an honest political intent in exhibiting these constructions, or that he had no intent at all, that element is not essential to a conviction of violating a statute which is *malum prohibitum*" (A 17a); 26 N.Y. 2d at 125.

Intent is a necessary element for a conviction in all cases involving the First Amendment. *Smith* v. *California,* 361 U.S. 147 (1959); *Scales* v. *United States,* 367 U.S. 203 (1961). As Chief Judge Fuld said in his dissent in this case: ". . . Although it is true that intent need not be an element of a crime—providing it is considered *malum prohibitum*—this is not the case where the challenged conduct involves the expression of political views". (A 21a-22a); 26 N.Y. 2d at 128 (1970).

A second basic policy underlying the "void for vagueness" doctrine is that no governmental regulation, especially in the First Amendment area, may vest an official with discretion to determine whether or not given conduct falls within its purview. E.g., *Connally, Commissioner* v. *General Construction Company,* 269 U.S. 385 (1926); *Cox* v. *Louisiana,* 379 U.S. 536 (1965). Such a policy is designed to protect against arbitrary and unequal enforcement of penal statutes in the sensitive area protected by the First Amendment. *Cox* v. *Louisiana, supra* at 557. *Staub* v. *City of Baxley,* 355 U.S. 313 (1958); *Kunz* v. *New York,* 340 U.S. 290 (1951); *Thornhill* v. *Alabama,* 310 U.S. 88 (1940) at 97-98.

The recent history of New York's flag desecration statute bears painful witness to the wisdom of the rule enunciated in *Thornhill*. Unfortunately, it appears that the flag veneration statute has been enforced with particular vigor against persons expressing dissenting views. Despite the widespread use of the flag in commercial contexts and in connection with orthodox political activity, counsel are aware of no prosecution for such activity.

In fact, the only persons against whom New York's flag laws have been invoked have been persons who have earned the enmity of local law enforcement officials by espousing dissenting political opinions or adopting non-conforming modes of dress.[8]

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[8] The following incidents reveal that the capacity for abuse inherent in New York's vague flag desecration statute has not been ignored.

In Claverack, New York, a young man was arrested for driving a red, white and blue Volkswagen (he also has a brown beard). *People* v. *Pregaskis*, currently pending in Claverack Justice of the Peace Court.

In Happaugue, New York, a young housewife was arrested and held on $500 bail for flying her American flag upside down to protest the Vietnam War. The Nassau County District Attorney appealed from the dismissal of her case. *People* v. *Hubner*, Nassau District Court. No action was taken, however, when the neighboring Rockville Centre American Legion flew its American flag upside down to protest government inaction concerning the Pueblo incident. *Newsday*, February 5, 1968, p. 15.

The District Attorney of Nassau County threatened to arrest any person found displaying the emblem of Women Strike for Peace in Nassau County. The emblem consists of a representation of the American flag with a peace symbol superimposed thereon. *Long Island Vietnam Moratorium Committee* v. *Cahn, supra.*

Counsel herein represent approximately 60 persons who have already been arrested in New York City for displaying the Women Strike for Peace emblem.

On the other hand, as was pointed out to the trial court at the time of sentencing (A 120a) there was then on public exhibition in New York City, the art collection of the Governor of the State

Even if some of the goals of the statute are *arguendo* proper, it must fall in its entirety because its application is so broad that it encompasses communications protected by the First Amendment. This is "a panel statute susceptible of sweeping and improper application." *NAACP* v. *Button*, 371 U.S. 415 (1963) at 432-433.

This Court has consistently refused to uphold a penal statute when conduct protected by the First Amendment may be deemed by local law enforcement officials to fall within the terms of its proscription. Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970); Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. of Pa. Law Rev. 67 (1960). Such overbroad statutes have been held to violate the constitution because they invite local law enforcement officials to suppress constitutionally protected conduct in the mistaken belief that such conduct is prohibited by the statute in question.

As the Court pointed out in *Hodsdon* v. *Buckson*, 310 F. Supp. 528 (D. Del. 1970), the Delaware statute which is essentially identical to the New York statute at issue herein,

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of New York, including a painting that consisted of the American flag with potatoes inserted in the field of stars, a picture of Governor Rockefeller imposed on the stripes, and also imposed on the stripes the words "Use Fork", "Idaho" and "New York". The newspaper advertisement for the art exhibit and the cover of the program reproduced this painting. Two or three weeks prior to the sentencing of appellant, the Governor's painting was reproduced in color as the cover of the New York Times Sunday Magazine. Needless to say, there was no prosecution of the persons sponsoring that art exhibit, of the New York Times, or of any of the newspapers which printed the advertisement. At the time of the argument in the New York Court of Appeals it was pointed out to that court that this same painting then hung in the Executive Mansion, a short distance from the courthouse.

Appellant is not offended by the use of the flag by patriotic groups, or, even in a commercial context. He is offended, however, that New York State's law enforcement apparatus enforces the statute with particular severity against political dissenters.

is capable of application to an infinite variety of expressive "conduct," ranging from flag burning to flying one's flag at half mast, to unorthodox gestures aimed at the flag. The existence of so broad a proscription impinges upon areas which are protected by the First Amendment and therefore renders the statute unconstitutional.

IV.

The Equal Protection Clause of the Fourteenth Amendment Bars the Conviction of Appellant for Displaying Sculpture in an Art Gallery Under a Statute Which Permits Newspaper and Magazine Publishers to Show Photographs of That sculpture in Their Publications and Permits Exhibition of Paintings on the Same Theme.

The statute under which appellant was convicted provides that it shall not apply to "an ornamental picture . . . or newspaper, or periodical. . . ."

A photograph of the flag-wrapped figure hanging by a yellow noose, which was in appellant's second floor gallery window, was printed in Life Magazine without danger of prosecution (A 49a). There is no conceivable rationale for permitting photographs of sculpture to be published in newspapers and periodicals and prohibiting an exhibition of the sculpture itself.

The equal protection clause of the Fourteenth Amendment forbids the State from arbitrarily discriminating between different classes of persons. Classification is permitted only when it is founded upon a rational policy, *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

It is difficult to imagine a sound justification for applying the statute to a person who exhibits sculpture, the appellant in the instant case, and not to one who publishes

pictures of that sculpture or who exhibits paintings with the same theme.[9] There can be no legitimate reason to permit in a periodical a use of the flag which is prohibited in a sculpture exhibit. The statute, therefore, engages in invidious discrimination between similar groups—artists who paint and those who sculpt, art gallery proprietors who exhibit paintings or photographs and those who exhibit sculptures, and magazine and newspaper publishers, on the one hand, and art gallery proprietors on the other—and violates the equal protection clause of the United States Constitution.

CONCLUSION

For the Reasons Set Forth Above the Statute in Question Should Be Declared Unconstitutional and the Appellant's Conviction Reversed.

Respectfully submitted,

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[9] On the wall of appellant's gallery during the sculpture exhibition, there was displayed a painting of the noose figure and two other paintings using the flag motif (A 79a).